

**J.P. Patti Co. and Carpenters Union Local No. 1006,
a/w United Brotherhood of Carpenters, AFL–
CIO and Sheet Metal Workers Local Union No.
27 and Newmet Corporation.** Case 22–CD–685

October 13, 2000

DECISION AND DETERMINATION OF DISPUTE
BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN
AND HURTGEN

The charge in this Section 10(k) proceeding was filed by J.P. Patti Co. (Patti), alleging that the Respondent, Carpenters Local Union No. 1006, a/w United Brotherhood of Carpenters, AFL–CIO (Carpenters), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Patti to assign certain work to employees it represents rather than to employees represented by Sheet Metal Workers Local No. 27 (Sheet Metal Workers). The hearing was held on November 4, 1996, before Hearing Officer Nancy Wilson.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record,¹ the Board makes the following findings.

I. JURISDICTION

Patti, a New Jersey corporation, with an office and place of business in Saddle Brook, New Jersey, is engaged in the installation of commercial and industrial roofing. During the previous 12 months, Patti derived gross revenue in excess of \$50,000 from the performance of services directly for customers located outside New Jersey and purchased goods and materials valued in excess of \$5000 directly from points outside New Jersey. The parties stipulated, and we find, that Patti is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Thomas Nuckel, president of Newmet Corporation, testified that Newmet is a New Jersey corporation with an office in Paterson, New Jersey, and is engaged in the installation of metal siding and metal roofing. During the preceding 12 months, Newmet derived gross revenue in excess of \$1 million by performing services directly for employers located in New Jersey, including at least \$50,000 from Patti. We find that Newmet is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

¹ We grant the Charging Party's unopposed request to correct the transcript of the hearing as set forth at pp. 1–2 of its brief.

The parties stipulated, and we find, that the Carpenters and the Sheet Metal Workers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

Patti is a contractor engaged in the installation of commercial and industrial roofing. Patti's principal place of business is in Saddle Brook, New Jersey, but it performs work throughout the State of New Jersey and the northeast United States. Patti is signatory to labor agreements with the New Jersey State Council of Carpenters and with Carpenters Local 15. It is also signatory to a labor agreement with Sheet Metal Workers Local 25. Patti is not directly signatory to a contract with Sheet Metal Workers Local 27. However, Patti's agreement with Sheet Metal Workers Local 25 contains a provision under which Patti has agreed that whenever it performs work outside the jurisdiction of Local 25, it will abide by the local agreement negotiated by the Sheet Metal Workers local which has jurisdiction over that area. Patti's contract with Local 25 also contains a union signatory subcontracting clause that precludes Patti from subcontracting covered jobsite work to any subcontractor that does not agree to abide by the contract.

In 1996, Patti bid on and was awarded a contract to perform roofing work on a high school being built for the South Brunswick, New Jersey Board of Education at a site which is within the territorial jurisdiction of Sheet Metal Workers Local 27. Patti subcontracted the disputed metal roofing portion of the work to Newmet Corporation. Newmet is signatory to collective-bargaining agreements with the Carpenters but not with Sheet Metal Workers Local 27.

On July 26, 1996,² Thomas Kohler, business representative of Sheet Metal Workers Local 27, telephoned Nick Timpone, vice president of Newmet, to inquire whether reports he had heard to the effect that Newmet was going to be the subcontractor for the metal roofing work on the South Brunswick high school job were true. Timpone confirmed that it was. At that point, depending on whose testimony is the more accurate, Kohler asked either that Newmet assign the disputed work to the Sheet Metal Workers or that it consider subcontracting the work to a sheet metal roofing contractor.³ Timpone replied that

² All dates refer to 1996.

³ There is conflicting testimony in the record on this point. Timpone testified that Kohler asked him to assign the work to the Sheet Metal Workers. Kohler testified that he asked Timpone if Newmet would be interested in subcontracting the work to a sheet metal roofing contractor. Both men agree that Timpone responded that Newmet "was signed" with the Carpenters and would not agree to Kohler's request,

Newmet was already “signed” with the Carpenters, and refused Kohler’s request.

In a letter dated July 30, Sheet Metal Workers Local 27 informed Patti that Kohler had filed a grievance against Patti with the Local Joint Adjustment Board for the Sheet Metal Industry of Central and Southern New Jersey (LJAB), claiming a violation of the signatory subcontracting clause in Patti’s contract with Sheet Metal Workers Local 25. Patti informed the LJAB that it was not a party to a contract with Local 27 and therefore that the LJAB lacked authority to decide Local 27’s claim. The LJAB nonetheless later informed Patti that it had held a hearing on the claim on August 13, had found that Patti violated the signatory subcontracting clause, and had assessed damages against Patti in the amount of \$200,000.

About October 2, Carpenters Local 1006 Business Agent William Schlueter was contacted by Newmet President Thomas Nuckel, who informed him that the metal roofing work was about to begin, but that there was going to be a problem with Carpenters performing the work. Schlueter informed Patti, both by telephone and in writing, that the Carpenters would picket the job-site if they were not allowed to perform the disputed work. According to Schlueter, however, the Carpenters began performing the disputed work around the beginning of October and were still performing it at the time of the hearing.

B. Work in Dispute

The disputed work involves the construction and installation of metal roofing work being performed by Newmet at a school being built in Monmouth Junction, New Jersey, for the South Brunswick, New Jersey Board of Education.

C. Contentions of the Parties

Patti, Newmet, and the Carpenters all contend (either explicitly or implicitly) that this is a traditional jurisdictional dispute, that there is reasonable cause to believe that the Carpenters violated Section 8(b)(4)(D) of the Act, and that no agreed-upon method exists for voluntary adjustment of the dispute. Patti and the Carpenters argue that the disputed work should be awarded to employees represented by the Carpenters on the basis of employer preference and past practice, relevant collective-bargaining agreements, industry practice, relative skills, and economy and efficiency of operations. Newmet did not file a brief, but argued at the hearing that the work

should be awarded to employees represented by the Carpenters on the basis of its past practice.

The Sheet Metal Workers contends that there is no jurisdictional dispute here because, under the Board’s decision in *Capitol Drilling*,⁴ the Sheet Metal Workers did not make a claim to the work in question and never threatened either Patti or Newmet in order to acquire that work. Rather, it contends, it simply has a contractual dispute with Patti arising from Patti’s failure to abide by the terms of the union signatory subcontracting clause in its agreement with Sheet Metal Workers Local 25. Accordingly, the Sheet Metal Workers has moved that the Board quash the notice of hearing. Should the Board find that a jurisdictional dispute exists, however, the Sheet Metal Workers argues that the work should be awarded to employees it represents, apparently on the basis of area practice.

D. Applicability of the Statute

In *Capitol Drilling*, the Board held that in the construction industry, a union’s effort to enforce a lawful union signatory subcontracting clause against a general contractor through a grievance, arbitration, or court action does not constitute a claim to the subcontractor for the work. The Board, however, distinguished those cases in which a union does more than peacefully pursue a contractual grievance against a general contractor. The Board found that a true jurisdictional dispute arises when a union seeking enforcement of a contractual claim not only pursues its contractual remedies against the employer with which it has an agreement, but also makes a claim for the work directly to the subcontractor that has assigned the work. In such circumstances, the Board stated that it would find truly competing claims and the use of threat of coercion to enforce a claim by the representative of either group of employees would be sufficient to trigger an 8(b)(4)(D) allegation and consequent 10(k) proceeding. *Electrical Workers IBEW Local 363 (U.S. Information Systems)*, 326 NLRB 1382 (1998); *Capitol Drilling*, 318 NLRB at 811–812.⁵

The Sheet Metal Workers contends that, under *Capitol Drilling*, no jurisdictional dispute should be found to exist here. It argues that it did not claim the work from

⁴ *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995).

⁵ Chairman Truesdale notes that he dissented in *Capitol Drilling*. See 318 NLRB at 812–813. He agrees with his colleagues, however, that the circumstances of this case are distinguishable and that the holding from which he dissented in *Capitol Drilling* is not applicable here.

Member Hurtgen has previously stated his reservations regarding the Board’s holding in *Capitol Drilling*. See, e.g., his concurring opinion in *Laborers Local 113 (Super Excavators)*, 327 NLRB 113 (1998). However, inasmuch as the instant case is distinguishable from *Capitol Drilling*, it is unnecessary for him to pass on the Board’s holding in *Capitol Drilling*.

however it was phrased. They also agree that Kohler did not threaten Timpone with picketing or work stoppages.

Newmet, and that it merely filed a grievance against Patti for breach of the union signatory subcontracting clause in Patti's contract with Sheet Metal Workers Local 25. As there is no contention that it threatened or otherwise coerced anyone, the Sheet Metal Workers contends that Section 10(k) should not be found to apply here, and that the notice of hearing should be quashed.

We disagree. As we have noted, the record does not establish exactly what Kohler said to Timpone on July 26. According to Timpone, Kohler asked him to assign the work to the Sheet Metal Workers. According to Kohler, he asked only if Newmet would be interested in subcontracting the metal roofing work to a sheet metal roofing contractor. However, in 10(k) proceedings, a conflict in testimony does not prevent the Board from finding evidence of reasonable cause and proceeding with a determination of the dispute. *Sheet Metal Workers Local 107 (Lathrop Co.)*, 276 NLRB 1200, 1202 fn. 3 (1985). We find that the testimony of Timpone is sufficient to establish reasonable cause to believe that Sheet Metal Workers made a claim for the disputed work directly to Newmet. Further, as described above, Carpenters Business Agent Schlueter threatened Patti that the Carpenters would picket Patti's jobsite unless the disputed work was assigned to the Carpenters.⁶ Therefore, we find that there are competing claims to Newmet for the work, and that a true jurisdictional dispute exists.⁷

We therefore find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act.⁸ Accordingly, we find that the dispute is properly before the Board for determination, and we deny the Sheet Metal Workers' motion to quash the notice of hearing.

⁶ According to Schlueter, employees represented by Carpenters are currently performing the disputed work. Performance of work by a group of employees is evidence of a claim for the work by those employees, even in the absence of an explicit claim. *Longshoremen ILWU Local 14 (Sierra Pacific Industries)*, 314 NLRB 834, 836 (1994).

⁷ *Capitol Drilling*, 318 NLRB at 811-812.

As we explain below, we find that the disputed work should be awarded to employees represented by the Carpenters. Our award does not preclude the Sheet Metal Workers from pursuing its grievance seeking damages against Patti for violation of the signatory subcontracting clause, provided that it does not continue to claim the work from Newmet or engage in threats or other coercion. *Id.* at 810 fn. 4, citing *Carpenters Local 33 (AGC of Massachusetts)*, 289 NLRB 1482, 1484 (1988).

⁸ All parties except the Sheet Metal Workers stipulated that no such agreed-upon method exists. The Sheet Metal Workers declined to join in the stipulation, but presented no evidence that such a method exists.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Collective-bargaining agreements

Newmet is signatory to an agreement with the New Jersey State Council of Carpenters, which requires Newmet to abide by the terms and conditions of all collective-bargaining agreements between Carpenters local unions and district councils and the Building Contractors Association of New Jersey (BCANJ). Newmet is also signatory to an agreement between BCANJ, the Hudson County Contractors Association, and Hudson County Carpenters, Millwrights, and Lathers Local Union No. 6. That agreement also requires Newmet to abide by the terms and conditions of employment in effect in the territories of all Carpenters locals in New Jersey, and it arguably asserts jurisdiction over metal roofing work. Newmet has no collective-bargaining relationship or contract with Sheet Metal Workers Local 27. Accordingly, we find that this factor supports an award of the disputed work to employees represented by the Carpenters.⁹

2. Company preference and past practice

Both Nuckel and Timpone testified that, during its 10-year existence, Newmet has consistently assigned metal roofing work to employees represented by carpenters unions,¹⁰ and that they prefer to continue to do so. We find that this factor supports an award of the disputed work to employees represented by the Carpenters.

3. Area and industry practice

The record reflects that contractors in New Jersey assign metal roofing work to both carpenters and sheet metal workers. Thus, Charles Volpe, Patti's CEO, testi-

⁹ Patti has collective-bargaining agreements with Sheet Metal Workers Local 25, the New Jersey State Council of Carpenters, and Carpenters Local 15. However, it is the subcontractor's labor agreements, not those of the general contractor, that are relevant to a 10(k) award. See *Carpenters Local 1207 (Carlton, Inc.)*, 313 NLRB 71, 72 fn. 6 (1993).

¹⁰ The record contains evidence of one exception to this past practice, a job on which Newmet employed a mixed crew of carpenters and sheet metal workers (not from Local 27) that was worked out by business agents of the two unions. Nuckel, however, testified that the use of that composite crew was not his preference.

fied that when it does such work itself, rather than subcontracting it, it almost always uses carpenters rather than sheet metal workers. He also testified that the industry practice in New Jersey is to use carpenters. As noted above, Nuckel and Timpone testified that Newmet assigns such work to carpenters. Schlueter testified that, in the jurisdiction of Carpenters Local 1006, carpenters do metal roofing work. Kohler, however, testified that metal roofing work in Sheet Metal Workers Local 27's territorial jurisdiction has been done by sheet metal workers. We find that this factor does not support an award of the disputed work to employees represented by either union.

4. Relative skills

The record does not indicate that either carpenters or sheet metal workers possess skills or specialized training that members of the other trade lack. Members of both trades perform metal roofing work. We find this to be a neutral factor.

5. Economy and efficiency of operations

The record contains no evidence that would support a finding that Newmet would experience greater economy and efficiency of operations by using one group of employees rather than the other. Accordingly, we find that this factor is inconclusive.

6. Joint board determinations

The LJAB found that Patti had violated the signatory subcontracting clause of its collective-bargaining agreement with Sheet Metal Workers Local 25 by subcontracting the disputed work to Newmet, which has no contract with the Sheet Metal Workers. The minutes of the LJAB proceedings, however, indicate that the LJAB was concerned only with the alleged contract violation. It did not

purport to make an award of the disputed work and, except for the collective-bargaining agreement with Sheet Metal Workers Local 25, there is no evidence that it considered any of the factors the Board considers in making an award in a 10(k) proceeding. Accordingly, we find that the LJAB's decision does not favor an award of the work to either group of employees.¹¹

Conclusion

After considering all the relevant factors, we conclude that employees represented by Carpenters Union Local No. 1006, a/w United Brotherhood of Carpenters, AFL-CIO are entitled to perform the work in dispute. We reach this conclusion relying on the relevant collective-bargaining agreements, and Newmet's preference and past practice. In making this determination, we are awarding the work to employees represented by Carpenters Local 1006, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Newmet Corporation represented by Carpenters Union Local No. 1006, a/w United Brotherhood of Carpenters, AFL-CIO are entitled to perform the construction and installation of metal roofing work at a school being built in Monmouth Junction, New Jersey, for the South Brunswick, New Jersey Board of Education.

¹¹ See *Operating Engineers Local 318 (Kenneth E. Foeste Masonry)*, 322 NLRB 709, 713-714 (1996).